BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: ARACELI VALLE JARDON 2449 W. California Avenue Fresno, California 93706 Original Pharmacy Technician No. TCH 29177 Respondent.	Case No. 2869 OAH No. N2005110774

PROPOSED DECISION

This matter was heard before Karen J. Brandt, Administrative Law Judge, Office of Administrative Hearings, State of California, on February 3, 2006, in Sacramento, California.

Lorrie M. Yost, Deputy Attorney General, represented Patricia F. Harris (complainant), Executive Officer, Board of Pharmacy (Board), Department of Consumer Affairs.

Araceli Valle Jardon (respondent) appeared on her own behalf.

Evidence was received on February 3, 2006. Submission of this matter was deferred until February 7, 2006 to permit complainant an opportunity to submit certified originals of a License History Certification and Certification of Costs. On February 7, 2006, complainant submitted a certified original License History Certification, which was marked for identification as Exhibit 2 and received in evidence, replacing the uncertified copy of the License History Certification originally marked as Exhibit 2. On February 7, 2006, complainant also submitted a certified original Certification of Costs, which was marked for identification as Exhibit 10 and received in evidence, replacing the uncertified copy of the Certification of Costs originally marked as Exhibit 10.

The record was closed and the matter was submitted on February 7, 2006.

FACTUAL FINDINGS

1. Complainant made and filed the Accusation in her official capacity.

2. On April 30, 1999, the Board issued Original Pharmacy Technician Number TCH 29177 to respondent. The original pharmacy technician registration was in effect at all times relevant in this matter.

3. Respondent began working as a pharmacy technician for Walgreens Pharmacy, Store No. 2703 (Store 2703) in October 2003. Respondent's duties included filing, cashiering, and filling prescriptions under the supervision of a pharmacist. Initially, as an additional duty, respondent was assigned to check inventory.

4. In 2004, May Yang (Yang), the Pharmacy Manager at Store 2703, began noticing that the amounts of Vicodin the store had on its shelves were significantly less than the amounts recorded in the store's computer. Vicodin is designated as a Schedule III controlled substance. Yang notified Ray Rosenfelder (Rosenfelder), Store 2703's Loss Prevention Supervisor, of the significant discrepancies. Rosenfelder installed a video camera in a false ceiling in the store's pharmacy to monitor the overstock area where the bottles of narcotics, including Vicodin, were kept.

5. On May 10, 2004, at approximately 4:35 p.m., the video camera recorded respondent entering the overstock area, taking a bottle off the shelf, removing something from that bottle with her hand, returning the bottle to the shelf, and exiting the overstock area. The bottle respondent took from the shelf was in the area where the Vicodin bottles were kept. From the videotape, it appears that respondent entered the overstock area from the cash register area, and returned to the cash register area.

6. On May 10, 2004, from 1:30 p.m. to 10:00 p.m., respondent was assigned to work at Store 2703 as a cashier. According to Yang, a pharmacy technician assigned as a cashier normally would not fill prescriptions. It was possible, however, that respondent could have been asked to fill a prescription under the supervision of a pharmacist if no other pharmacy technicians or pharmacists were available. Even if respondent had been asked to fill a prescription, it would not have been appropriate for her to take pills directly from an overstock bottle with her hand.

As Yang explained, pills are generally put in a Baker Cell machine, which is connected to the store's computer system and automatically counts and dispenses pills. Each type of pill is placed in a different Baker Cell. If a Baker Cell runs out of pills while a prescription is being filled, a pharmacist or pharmacy technician would generally refill the empty Baker Cell from an overstock bottle and continue filling the prescription from the Baker Cell. Alternatively, the pharmacist or pharmacy technician could put the pills from the overstock bottle onto a pill counter and count the pills from the counter. Pharmacists and pharmacy technicians avoid touching pills with their hands.

7. On May 11, 2004, immediately after respondent clocked into work at 1:30 p.m., Rosenfelder asked to speak to her in the management office. Rosenfelder interviewed respondent for approximately 50 minutes. During the first 45 minutes, respondent denied any wrongdoing. After about 45 minutes, respondent stated that, on the previous day, she ran out of pills while she was filling a Vicodin prescription; she obtained additional pills from an overstock bottle and put those pills in her smock pocket; she was called away and mistakenly took the pills home with her; those pills were on her dresser at home; and she intended to bring them back to the store. Given the manner in which prescriptions are generally filled, respondent's statement to Rosenfelder that she took a handful of pills from an overstock bottle in order to fill a prescription and then mistakenly forgot them in her smock pocket was not credible. It is found that respondent improperly took Vicodin from an overstock bottle in Store 2703.

8. After Rosenfelder interviewed respondent, he called the police. Police Officer Cary Phelps investigated the incident. Before Officer Phelps gave respondent any Miranda warnings, he asked whether she had taken the pills and she said "yes." Officer Phelps then advised respondent of her Miranda rights and she declined to make any further statements. Officer Phelps placed respondent in custody and asked whether she had any pills in her possession. She responded that she had a bottle of prednisone in her purse. In respondent's purse was a prescription vial with respondent's name and prednisone prescription information on the label. Officer Phelps saw four or five different types of pills in the vial, including approximately 20 larger white pills. Officer Phelps showed one of the larger white pills to Rosenfelder, who asked a pharmacist to identify it. The pharmacist identified the pill as generic Vicodin. Respondent told Officer Phelps that she had a prescription for Vicodin and that she had put her prescription Vicodin in her prednisone vial. Officer Phelps booked the vial into evidence at police headquarters, where its contents were photographed.

9. Inspector Rick Iknoian (Iknoian) was assigned to investigate this matter for the Board. On September 16, 2004, Iknoian interviewed respondent. Respondent first told Iknoian that she placed the Vicodin she took from Store 2703 in an unlabeled bottle that she capped in the store; she later stated that the vial in which she had put the Vicodin did not have a cap, so she emptied the Vicodin pills into her prednisone vial, in order to return those pills to the store.

Respondent signed a release, which authorized Iknoian to obtain information about her prescriptions. That information showed that respondent had prescriptions for both prednisone and Vicodin.

10. After Iknoian interviewed respondent, he received the photograph that the police had taken of the pills in respondent's prednisone vial. Iknoian identified the pills in the photograph to include Norco, Valium and Viagra, in addition to Vicodin.[1] Norco,

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[1] The Accusation alleges that there were 17 Vicodin, seven Norco, four Viagra, and six Valium in respondent's prednisone vial. Complainant did not submit sufficient evidence at hearing to establish the exact number of each of these drugs in respondent's prednisone vial.

Valium and Viagra are all prescription medications. Norco is a Schedule III controlled substance. Valium is a Schedule IV controlled substance. On December 9, 2004, Iknoian telephoned respondent to inquire about these pills. Respondent told Iknoian that she did not have prescriptions for Norco, Valium or Viagra, and knew nothing about these pills in her prednisone vial. Norco, Valium and Viagra are not included on the list of respondent's prescription medications obtained by Iknoian. Given the fact that Officer Phelps found respondent in possession of a vial that contained Norco, Valium and Viagra, respondent's denial to Iknoian of any knowledge about these pills was not credible. It is found that respondent improperly possessed Norco, Valium and Viagra.

11. Complainant has requested costs of investigation and enforcement pursuant to Business and Professions Code section 125.3 in the total amount of $2,607.00. This amount includes 4.25 hours of Inspector time at $65.00 per hour, .75 hours of Deputy Attorney General time at $139.00 per hour, and 15.25 hours of Deputy Attorney General time at $146.00 per hour. The Deputy Attorney General's time was spent on a number of tasks, including conducting an initial case evaluation; obtaining, reading and reviewing the investigative material and requesting further investigation; drafting pleadings, subpoenas, correspondence, memoranda, and other case-related documents; researching relevant points of law and fact; locating and interviewing witnesses and potential witnesses; consulting and/or meeting with other deputies, staff, experts, client staff and investigators; communicating and corresponding with respondent; requesting discovery; and preparing for hearing. The time spent appears to be reasonable, and the activities conducted appear to be necessary and appropriate to the development and presentation of the case. Respondent was given an opportunity to comment on the nature and amount of the costs. Respondent did not, however, testify concerning her current income or ability to pay the requested costs.

LEGAL CONCLUSIONS

1. Business and Professions Code section 4301, in relevant part, provides that the Board

> ...shall take action against any holder of a license who is guilty of unprofessional conduct .... Unprofessional conduct shall include, but is not limited to, any of the following:
>
> [¶]...[¶]
>
> (f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

As set forth in Findings 5 and 7, respondent improperly took Vicodin, a controlled substance, from Walgreens Pharmacy. This wrongful act involved dishonesty, fraud and deceit, and establishes cause to revoke respondent's license under Business and Professions Code section 4301, subdivision (f).

2. Business and Professions Code section 4301, subdivision (j), provides that disciplinary action shall be taken against a license holder who violates "any of the statutes of this state or of the United States regulating controlled substances and dangerous drugs." Section 4301, subdivision (o) provides that disciplinary action shall be taken against a license holder who violates or attempts to violate, "directly or indirectly, ... any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board." Business and Professions Code section 4060, in relevant part, provides that "[n]o person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician..." Health and Safety Code section 11350, in relevant part, provides:

> Except as otherwise provided in this division, every person who possesses ... any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison.

As set forth in Finding 10, respondent possessed Valium and Norco, controlled substances for which she had no prescription. Respondent's possession of these drugs without a prescription establishes cause to revoke respondent's license under Business and Professions Code section 4301, subdivisions (j) and (o), in conjunction with Business and Professions Code section 4060 and Health and Safety Code section 11350.

3. Respondent did not present any evidence of rehabilitation.

4. Pursuant to Business and Professions Code section 125.3, a licensee found to have violated the licensing act may be ordered to pay the reasonable costs of investigation and prosecution of a case. In *Zuckerman v. Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the California Supreme Court set forth factors to be considered in determining the reasonableness of the costs sought pursuant to statutory provisions like Business and Professions Code section 125.3. These factors include whether the licensee has been successful at hearing in getting charges dismissed or reduced, the licensee's subjective good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to pay, and whether the scope of the investigation was appropriate in light of the alleged misconduct.

Respondent was not successful in getting any allegations dismissed. Respondent did not raise a colorable challenge to the proposed revocation of her license or present any evidence of her subjective good faith belief in the merits of her position or her financial ability to pay the costs sought. The Board's investigation and prosecution efforts in this matter appear to be appropriate in light of the nature of the proven misconduct. In sum, $2,607.00 is a reasonable amount for investigation and prosecution costs in this matter.

ORDER

1. Pharmacy Technician Registration No. TCH 29177, issued to respondent Araceli Valle Jardon, is REVOKED.

2. Respondent Araceli Valle Jardon is ordered to pay the Board of Pharmacy the costs of investigation and prosecution of this matter in the amount of $2,607.00 within 30 days after the effective date of this decision.

DATED: March 2, 2006

KAREN J. BRANDT
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: ARACELI VALLE JARDON 2449 W California Ave Fresno, CA 93706 Pharmacist Technician Registration No. TCH 27598 Respondent.	Case No. 2869 OAH No. N2005110774

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Board of Pharmacy as its Decision in the above-entitled matter.

This decision shall become effective on April 28, 2006.

It is so ORDERED on March 29, 2006.

BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

By

STANLEY W. GOLDENBERG
Board President

BILL LOCKYER, Attorney General
of the State of California
LORRIE M. YOST, State Bar No. 119088
Deputy Attorney General
California Department of Justice
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 445-2271
Facsimile: (916) 327-8645

Attorneys for Complainant

BEFORE THE
BOARD OF PHARMACY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: ARACELI VALLE JARDON 2449 W. California Avenue Fresno, CA 93706 Original Pharmacy Technician No. TCH 29177 Respondent.	Case No. 2869 **ACCUSATION**

Complainant alleges:

PARTIES

1. Patricia F. Harris (Complainant) brings this Accusation solely in her official capacity as the Executive Officer of the Board of Pharmacy, Department of Consumer Affairs.

2. On or about April 30, 1999, the Board of Pharmacy issued Original Pharmacy Technician Number TCH 29177 to Araceli Valle Jardon (Respondent). The original pharmacy technician registration was in effect at all times relevant to the charges brought herein and will expire on April 30, 2007, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board of Pharmacy (Board), Department of Consumer Affairs, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 4301 of the Code states:

"The board shall take action against any holder of a license who is guilty of unprofessional conduct or whose license has been procured by fraud or misrepresentation or issued by mistake. Unprofessional conduct shall include, but is not limited to, any of the following:

"(f) The commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not.

"(j) The violation of any of the statutes of this state or of the United States regulating controlled substances and dangerous drugs.

"(o) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of this chapter or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the board.

5. Section 118, subdivision (b), of the Code provides that the expiration of a license shall not deprive the Board of jurisdiction to proceed with a disciplinary action during the period within which the license may be renewed, restored, reissued or reinstated.

6. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licentiate found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

DRUGS

7. "Hydrocodone/acetaminophen" also known as "Vicodin", also known as dihydrocodeinone, is a compound consisting of 500mg. acetaminophen per tablet and 5mg.

hydrocodone bitartrate and a Schedule III controlled substance as designated by Health and Safety Code section 11056, subdivision (e)(4).

8. "Valium" is a brand name of diazepam and is a Schedule IV controlled substance as designated by Health and Safety Code section 11057(d)(9).

FIRST CAUSE FOR DISCIPLINE

(Acts of Moral Turpitude)

9. Respondent is subject to disciplinary action under section 4301(f) in that Respondent committed an act involving moral turpitude, dishonesty, fraud, deceit, or corruption, in that while working as a pharmacy technician at Walgreens, she diverted approximately 20 vicodin 7.5 - 750 tablets from her employer. The facts and circumstances are that, on or about May 10, 2004, Respondent went into the Walgreen pharmacy stock area where she did not belong, placed the vicodin pills into her smock pocket, and went home without returning the pills.

SECOND CAUSE FOR DISCIPLINE

(Unlawful Possession of Controlled Substance)

10. Respondent is subject to disciplinary action under sections 4301(j) and 4301(o) in conjunction with section 4060 and Health and Safety Code section 11350, in that Respondent violated laws of the State of California regarding controlled substances by possessing dangerous drugs and/or controlled substances without a current prescription. The facts and circumstances are that, on or about May 11, 2005, Respondent was found to have on her person the following items for which she had no prescription:

a. 17 tablets of "M360" vicodin (Hydrocodone 7.5mgs/Acetaminophen 750mgs.);

b. 7 tablets of "V3601" (Hydrocodone 10mgs/Acetaminophen 325mgs.);

c. 4 tablets of Viagra (Sildenafil);

d. 6 tablets of Valium (Diazepam) 5mgs;

and assorted other tablets of unknown type and/or non-prescription and non-controlled substances.

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PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Board of Pharmacy issue a decision:

1 Revoking or suspending Original Pharmacy Technician Number TCH 29177, issued to Araceli Valle Jardon.

2. Ordering Aracelli Valle Jardon to pay the Board of Pharmacy the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 125.3;

3. Taking such other and further action as deemed necessary and proper.

DATED: 9/19/05

P. F. Harris

PATRICIA F. HARRIS
Executive Officer
Board of Pharmacy
Department of Consumer Affairs
State of California
Complainant

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